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No. 833

IN THE

Supreme Court of the United States

OCTOBER TERM 19....

HOUSTON CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.
AND
CONSTRUCTION EMPLOYERS' ASSOCIATION OF TEXAS,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Houston Chapter, Associated General Contractors of America, Inc. and Construction Employers' Association of Texas, hereinafter called the Petitioners, petition for a writ of certiorari to review the opinion, judgment, and decree of the United States Court of Appeals for the Fifth Circuit entered in the instant case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 349 F. 2d 449.[1] The decision and order of the National Labor Relations Board is reported at 143 NLRB 409.[2]

JURISDICTION

The opinion and judgment of the Court below were entered on August 12, 1965. On September 1, 1965, a petition for rehearing was filed. On September 14, 1965, the petition for rehearing was denied, and a decree enforcing the order of the Board was entered on September 22, 1965.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1). The jurisdiction of the Court below and of the Board rested on 29 U.S.C. § 160.

QUESTIONS PRESENTED

I. Did the Court below err in finding that the Union's proposal for an exclusive referral arrangement constituted "wages, hours and other terms and conditions of employment" within the meaning of § 8 (d) of the National Labor Relations Act, as amended [29 U.S.C. § 151 *et seq.*][3] and

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[1] The opinion, judgment, order denying petition for rehearing and decree are reproduced in Appendix A, *infra.*

[2] References to the formal papers, including the findings of fact, conclusions of law and orders of the Trial Examiner and of the Board, printed as Volume I of the Transcript of the Record in the Court below, are designated by the appropriate page number in Volume I of the Transcript of the Record preceded by "R".

References to portions of the testimony and exhibits printed as the Joint Appendix to the briefs of the parties in the Court below, are designated by their appropriate page number in the Joint Appendix preceded by "J.A."

Nine copies of Volume I of the Transcript of the Record and the Joint Appendix are filed herewith.

[3] Hereinafter called the Act.

was a mandatory subject of bargaining within the meaning of § 8 (a)(5) of the Act?

II. Did the Court below err in finding that the Union's proposal for an exclusive referral arrangement was protected by the Act and was beyond the jurisdiction of the laws of the State of Texas which prohibit the negotiation or execution of any agreement containing such a proposal?

STATUTES INVOLVED

The relevant statutory provisions are §§ 7, 8 (a)(3) and (5), 8 (d), 8 (f), and 14 (b) of the National Labor Relations Act, as amended, and Tex. Civ. Stat., Art. 5207a. These provisions are set forth in Appendix B, *infra*.

STATEMENT

The Petitioners are non-profit corporations authorized to act as the collective bargaining agents of their members and associate members which consist of various business enterprises engaged in the building and construction industry (R. 49-50, 23-24, 29, 42). Since 1955 Construction and General Laborers Union, Local No. 18, International Hod Carriers, Building and Common Laborers Union, AFL-CIO, hereinafter called the Union, has been voluntarily recognized by the Petitioners as the collective bargaining representative of hod carriers and common laborers employed by the Petitioners' members and associate members (R. 52, 82-83, 24-25, 29, 42).

On September 27, 1961, the Petitioners and the Union began meeting for the purpose of negotiating a new collective bargaining agreement to succeed the then existing agreement due to expire on October 31, 1961 (R. 83, J.A. 11, 35, 73). At that time, the Union submitted a proposed new agreement which contained an exclusive referral clause,

which required that "the Union shall be the sole and exclusive source of referrals of applicants for employment" and that in the event the employer hired an employee from any source other than the Union, the employee would be "temporary" and would be replaced "as soon as registered applicants for employment" were available (R. 83, 25, 29-30, J.A. 76, 80-81).[4]

A second meeting was held on October 5, 1961, at which time the Petitioners rejected the Union's proposal for an exclusive referral arrangement on the ground that their attorney had advised them that such a proposal violated the Texas right-to-work law (R. 83, J.A. 37). During the meeting, the Petitioners submitted a counter-proposal providing for the retention of the existing system of job referrals (J.A. 37, 41, 59, 85-86).

Subsequent negotiation meetings were held on October 11, 25, 30, 31 and November 1, 1961 (R. 53, fn. 1, J.A. 23, 25).[5] During these meetings the Union defended the legality of its proposal for an exclusive referral arrangement and urged that some form of exclusive referral arrangement was absolutely necessary (J.A. 42-45, 60). During these meetings, the Petitioners continued to answer that an exclusive referral arrangement would be violative of the Texas right-to-work law[6] and on this basis refused to discuss the particular terms of the Union's proposal relating to an

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[4] No negotiations took place at the first meeting since the Petitioners' representatives requested time to study the Union's proposal (R. 83).

[5] Between the second negotiation meeting, on October 5, 1961, and the third negotiation meeting on October 11, 1961, the members of the Union voted to reject the Petitioners' counter-proposal and to "stay with" the Union's proposal for an exclusive referral arrangement (J.A. 54, 59-60).

[6] The Petitioners expressed rejection of the Union's proposal for an exclusive referral arrangement on the additional ground that the proposal was "morally" incorrect (J.A. 63).

exclusive referral arrangement (R. 83, 53, J.A. 16-20, 37-42, 63, 67-69). Then, in an effort to satisfy the Union's objections to the existing hiring arrangement, on October 31, 1961, the Petitioners proposed a so-called "co-operation clause" which provided that the Union would have an "equal opportunity" to refer job applicants to the contractors, but which reserved to the contractors "the right to hire employees from whatever source. . . . [the contractors] see fit" (J.A. 63, 97).

On November 1, 1961, the Union called a strike in support of its contractual demands (R. 83, J.A. 31). Thereafter, the Petitioners filed a petition for injunctive relief in the District Court of Harris County, Texas, alleging that the Union's strike in support of its demand for an exclusive referral arrangement was contrary to the public policy embodied in the Texas right-to-work law (J.A. 97-103, 105-10). On November 17, 1961, the District Court granted a temporary injunction enjoining the Union's strike, so long as it "has as an object the obtaining of an agreement . . . which provides that the . . . Union shall be the sole or exclusive source of referrals of applicants for employment in violation of . . . the [Texas] Revised Civil Statutes" (R. 83, J.A. 112-16).

On November 21, 1961, negotiations were resumed and on November 25, 1961, the parties executed a memorandum agreement which specified certain modifications of the pre-existing agreement (J.A. 20-21, 70, 120). On November 29, 1961, the new agreement was formally executed, together with a stipulation which provided that the execution of the new agreement should be "without prejudice to the right of either party to appeal" in the cause before the District Court of Harris County, Texas, and that "[n]either party will contend in said case that the dispute as to the hiring hall subject is moot since the same was withdrawn

by the Union solely because it was compelled to do so by injunction of the Court" (R. 83-84, J.A. 123, 124).

Although the Union thereafter appealed the District Court's decision granting a temporary injunction, the Union later moved to dismiss the appeal (R. 84, 54, J.A. 48-49, 51, 131-32). On March 27, 1962, the Texas Court of Civil Appeals granted the Union's motion and dismissed the appeal (R. 84, J.A. 132-33).

The Board's Conclusions and Order. In agreement with its Trial Examiner, and by a bare majority of 3 to 2, the Board concluded that the Petitioners had refused to bargain concerning the Union's proposal for an exclusive referral arrangement in violation of § 8 (a)(5) of the Act and ordered the Petitioners to cease and desist and to post appropriate notices (R. 69-71, 93). In so holding, the Board rejected the Petitioners' contention that the Union's proposal for an exclusive referral arrangement fell within the ambit of § 14 (b) of the Act and was subject to regulation by the States (R. 89-91). The Board majority also rejected the Petitioners' argument that the Union's proposal for an exclusive referral arrangement was not a mandatory subject of bargaining within the meaning of § 8 (d) of the Act, which restricts the required subjects of bargaining to "wages, hours, and other terms and conditions of employment" (R. 84-89).

In disagreement with the majority, the two dissenting members of the Board concluded that the Union's proposal for an exclusive referral arrangement related to a "condition precedent to employment," rather than to a condition of employment itself, and was therefore not a mandatory subject of bargaining under § 8 (a)(5) and (d) of the Act (R. 95-96, 98-99). In support of this conclusion, the two dissenting members of the Board reasoned

that a "hiring hall does not deal with an employer's relationship to his employees because applicants for employment are not employees under Section 8 (d)" (R. 96-97, 98-99).

The Opinion of the Court Below. The Court below granted enforcement of the Board's order *in toto*. In doing so, the Court below concluded that the Union's proposal for an exclusive referral arrangement was beyond the jurisdiction of the laws of the State of Texas which prohibit the negotiation or execution of an agreement containing such a proposal. The primary reasoning of the Court below in reaching this conclusion was that "the long and short of this matter is that § 14 (b) contemplates only those forms of union security which are the practical equivalent of compulsory unionism" and that "membership in the union is not compulsory under the clause here in question."

In determining that the order of the Board should be enforced, the Court below also concluded that the Union's demand for an exclusive referral arrangement constituted "wages, hours and other terms and conditions of employment" within the meaning of § 8 (d) of the Act and was, therefore, a mandatory subject of bargaining within the meaning of § 8 (a)(5) of the Act.

THE REASONS FOR GRANTING A WRIT

I. The finding by the Court below that that Union's proposal for an exclusive referral arrangement constituted wages, hours and other terms and conditions of employment within the meaning of § 8 (d) of the Act and was a mandatory subject of bargaining within the meaning of § 8 (a)(5) of the Act, is in conflict with the applicable decisions of other Courts of Appeal and raises an important question of Federal law which has not been, and should be, settled by this Court.

It is well established that an employer's duty to bargain with a representative of its employees is limited by § 8(d) of the Act to matters directly relating to "wages, hours and other terms and conditions of employment" and that an employer is free to bargain, or not to bargain, on all other issues. See *NLRB* v. *Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342. *Cf., Local Union No. 189, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO* v. *Jewel Tea Co.*, ... U.S. ....., 14 Ld. Ed. 2d 640, 649. This Court recently considered the breadth of § 8(d) of the Act in *Fiberboard Corp.* v. *NLRB*, 379 U.S. 203, where this Court concluded that an employer's decision to subcontract certain work which involved "the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment" was subject to the mandatory duty to bargain. In doing so, this Court was basically concerned with ascertaining the outer limits of mandatory bargaining once the employee-employer relationship was established, *i.e.*, does the "termination of employment" fall within the ambit of mandatory bargaining. Limiting its decision to "the facts of th[e] case," this Court answered affirmatively.

The instant case now presents for determination the opposite end of the spectrum, *i.e.*, does the original *establishment* — rather than the *termination* — of the employee-employer relationship fall within the scope of mandatory bargaining. The answer to this question is one of fundamental importance in the construction and administration of the Act,[7] because the Union's proposal for an exclusive referral arrangement "impinges on the employer's privilege of choosing his employees" and "impede[s] the workingman's

[7] The Court below recognized that the instant case presented a "unique labor law question."

efforts to procure work" and entitles the Union "to insist upon the establishment of a hiring hall to the point of a bargaining impasse" and "to conduct a strike to gain this end" (R. 94). If the initial obtaining of employment is within the scope of obligatory collective bargaining, as the Court below held, then it must follow that in addition to an exclusive referral arrangement, an employer must bargain as to such major matters as the size of its labor force and the extent and timing of any expansion thereof, and as to such details as per diem allowances for job applicants summoned for interview or observation prior to their acceptance or rejection as employees (R. 95).

The decisions of this Court and other Courts of Appeal have indicated that subjects dealing with matters preceding the establishment of an employment relationship between the employer and the employee, such as the Union's proposal for an exclusive referral arrangement in the instant case, are not mandatory subjects of bargaining within the meaning of § 8(a)(5) and (d) of the Act.

In *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, this Court was concerned with a discriminatory refusal to hire job applicants allegedly in violation of § 8(a)(3) of the Act, which prohibits an employer from discriminating in regard "to *hire* or tenure of employment or any term or condition of employment". This Court expressly rejected the contention that "hire" was included within the scope of the terms "any term or condition of employment" and held as follows:

> "We are asked to read 'hire' as meaning the wages paid to an employee so as to make the statute merely forbid discrimination in one of the terms of men who have secured employment. So to read the statute would do violence to a spontaneous textual reading of Sec. 8(3) in that 'hire' would serve no function because, in the sense which is urged upon us, it is included in the

> prohibition against 'discrimination in regard to . . . any term or condition of employment.' Contemporaneous legislative history and, above all, the background of industrial experience forbid such textual mutilation."[8]

The decision by the Court of Appeals for the District of Columbia in *Local 164, Painters, Decorators & Paperhangers* v. *NLRB*, 293 F. 2d 133 (D.C. Cir. 1961), *cert. denied* 368 U.S. 824,[9] which the Court below failed to even acknowledge, most clearly establishes the error of the Court below in finding that the Union's proposal constituted a mandatory subject of bargaining. In that case, the Court reasoned as follows:

> ". . . in the statutory expression 'wages, hours and other terms and conditions of employment,' the word 'other' has significance: it shows that the terms and conditions of employment to which it refers are such as relate to the actual performance of work in the same sense that wages and hours relate to that subject, or to the relations between the parties which result from the performance of work. So, we think the statutory language 'other terms and conditions of employment' refers to and includes only those provisions, in addition to wages and hours, which have to do with *the actual performance of work or to subsequent relations.*

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[8] The efforts by the Board to avoid the consequences of the omission of the term "hire" in § 8 (d) of the Act by relying upon the definition of the term "employees" under § 2 (3) of the Act, which includes "applicants for employment" and "members of the working class generally" (R. 86-87, including fn. 8), is misplaced. The easy answer to this contention is that § 8 (a)(5) of the Act strictly limits the employer's bargaining obligation to "*his* employees", rather than to employees generally.

[9] It is noteworthy that the same Court of Appeals which decided *Fiberboard Corp.* v. *NLRB*, 322 F. 2d 411 (D.C. Cir. 1963), with affirmance by this Court, *supra*, also decided the Painters case, *supra*, which runs directly contrary to the reasoning of the Court below in the instant case.

> "... *We are unwilling to say that a condition precedent to employment is a 'condition of employment,'* such as wages and hours, *within the meaning of the statute*" ... (emphasis added)[10]

In attempting to avert the language of § 8 (a)(5) and (d) of the Act and the decisions which support the Petitioners' contention that the Union's proposal for an exclusive referral arrangement was not a mandatory subject of bargaining, the Court below placed substantial reliance upon the idea that "employment in the construction trade is transitory in nature." Such reasoning by the Court below in support of its finding constitutes no more or no less than an effort by the Court below to single out the building and construction industry for special consideration. The Court below cannot go beyond the special consideration given the building and construction industry by Congress, and there is clearly no legislative basis for such special consideration in the present context (R. 98). Although the Court below might consider the Union's proposal desirable in the building and construction industry, judicial restraint is required. If the scope of mandatory subjects of bargaining are to be expanded so as to discriminate against a particular industry, this must be left to the discretion of the Congress — and not the Court below. Moreover, the fact that the Court below felt that the particular industry "does not lend itself to employees' security through seniority rights," does not license the Court below to require the parties to expand

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[10] The effort by the Court below to bring its decision within the scope of *Borg-Warner, supra,* by asserting that the aim of the Union's proposal for an exclusive referral arrangement "bears directly on *regulating* relations between the employers and employees in the industry involved," is a mistatement of fact. The objectionable provisions of the Union's proposal dealt exclusively with the *establishment* — not the *regulation* — of the employment relationship and antedated the actual employment relationship.

their traditional bargaining obligations. As the Court observed in *NLRB* v. *Davison, d/b/a Arlington Asphalt Co.*, 318 F. 2d 550 (4th Cir. 1963):

> "It is obvious that most matters that might be discussed or proposed in collective bargaining are likely to bear some relation, even if tenuous, to 'wages, hours and other terms and conditions of employment.' But it would not necessarily follow that the . . . proposal, insisted upon to impasse, is itself a mandatory subject of bargaining. Not all proposals that somehow respond to a problem that is customarily bargained about may themselves be insisted upon to impasse . . . . It is the particular proposal, not merely the problem to which it is addressed, that must concern 'wages, hours and other terms and conditions of employment.'"

The finding by the Court below that the Union's proposal for an exclusive referral arrangement was a mandatory subject of bargaining also runs counter to the legislative history accompanying § 8 (f) of the Act. Basically, § 8 (f) of the Act provides that it shall not be an unfair labor practice for an employer engaged primarily in the building and construction industry to make an agreement with a labor organization, because (1) the majority status of the labor organization has not been established prior to the making of the agreement, *or* (2) the agreement requires as a condition of employment membership in the labor organization after the seventh (7th) day following the beginning of such employment or the effective date of the agreement, whichever is later, *or* (3) *the agreement requires the employer to notify the labor organization of opportunities for employment with such employer or gives the labor organization an opportunity to refer qualified applicants for employment, or* (4) the agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service

with the employer, in the industry or in the particular geographical area.

The House Report accompanying § 8(f) of the Act explained the impact of the section as follows:

> "The Conference adopts the provision of the Senate bill permitting prehire agreements in the building and construction industry. *Nothing in such provision is intended . . . to authorize the use of force, coercion, strikes or picketing to compel any person to enter such prehire agreements.*" H. Rep. No. 1147 on S. 1555, 86th Cong., 1st Sess. 42. (emphasis added)

In *NLRB* v. *Int'l Hod Carriers, Building and Common Laborers' Union of America, Local No. 440, AFL-CIO,* 285 F. 2d 397 (8th Cir. 1960), *cert. denied* 366 U.S. 903, the Court recognized the Congressional mandate accompanying § 8(f) of the Act, and stated as follows:

> "The Union . . . attempts to demonstrate the legality of its objectives [in picketing] by citing us to Section 8(f) of the 1959 amendments, which in summary provides that it shall not be an unfair labor practice under Subsections (a) and (b) of Section 8 for a labor organization and an employer engaged primarily in the building and construction industry, to enter into a hiring-hall agreement. Although Congress has given validity to such an agreement, *voluntarily* entered into by the parties, we find no Congressional approval of the use of strikes or picketing to compel execution of a prehire agreement. Indeed, the legislative history indicates the contrary to be true. The Conference Report which deals with the subject, states: 'The Conference adopts the provision of the Senate bill permitting prehire agreements in the building and construction industry. Nothing in such provision is intended to restrict the applicability of the hiring hall provisions enunciated in the Mountain Pacific case (119 NLRB 883, 893) *or to authorize the use of force,*

coercion, strikes or picketing to compel any person to enter into such prehire agreements." (emphasis added)

Admittedly, a Union is entitled to strike only in an effort to compel agreement on mandatory subjects of bargaining — not permissive issues. See *NLRB* v. *Wooster Div. of Borg-Warner Corp., supra.* As the Board admitted in the instant case, "the label 'mandatory subject' means that the Union is entitled to conduct a strike to gain its end" (R. 85). Under these circumstances, the finding by the Court below that the Union's proposal for an exclusive referral arrangement constitutes a mandatory subject of bargaining — which carried with it the corollary right to strike to compel agreement — was in direct contradiction of the Congressional intent that hiring arrangements in the building and construction industry are only permissible subjects of bargaining for which a Union may not attempt to compel agreement by the "use of force, coercion, strikes or picketing."

The only reason offered by the Court below in rejecting the obvious Congressional intent accompanying § 8(f) of the Act, was that "[t]he Union in the case at bar was the statutory bargaining agent and § 8(f) is not applicable here by way of limitation or otherwise." Under this construction of § 8(f) of the Act, the provisions of subsections 2, 3 and 4 of § 8(f) are only applicable if the requirements of subsection 1 exist. In other words, unless the majority status of the Union has not been established under the provisions of § 9 of the Act, as provided in subsection 1, the provisions of subsection 3 regarding the inclusion of provisions in the agreement regarding employer notification of opportunities for employment and opportunities to refer qualified applicants are supposedly inapplicable. If Congress had intended the various subsections of § 8(f) of the Act to be construed in the conjunctive

instead of the disjunctive, it could easily have used the word "and" and reached that result. However, since Congress chose to use the word "or" after each of the subsections, including subsection 1, it is required that all of the subsections be construed in the disjunctive. This elementary principle of statutory construction was stated in *NLRB* v. *Edward G. Budd Mfg. Co.*, 169 F. 2d 571, 576 (6th Cir. 1948), *cert. denied* 335 U.S. 908, as follows:

> "If Congress had intended the words to be construed in the conjunctive instead of the disjunctive, it could easily have used the word 'and' and reached that result. Its failure to do so, together with the use of the word 'or' leads us to construe the statute in the disjunctive. *Clyatt* v. *United States*, 197 U.S. 207, 218, 219, 25 S. Ct. 429, 49 L. Ed. 726."

See *Ohio Power Co.* v. *NLRB*, 176 F. 2d 385, 387 (6th Cir. 1949), *cert. denied* 338 U.S. 899.

Once it is acknowledged that all of the various subsections of § 8(f) of the Act must be read in the disjunctive, it then becomes clear that the provisions of subsection 3 relating to the notification of opportunities for employment and the giving of an opportunity to refer qualified applicants for employment are applicable to *all* employers engaged primarily in the building and construction industry, *irrespective of whether or not the provisions of subsection 1 relating to the execution of agreements where the Union has not established its majority status are applicable to the particular employer.* Therefore, since § 8(f) of the Act did not authorize the Union in the instant case to use "force, coercion, strikes or picketing" to obtain an agreement on its proposal, that proposal must be held to be a permissible — rather than a mandatory — subject of bargaining. See *NLRB* v. *Wooster Div. of Borg-Warner Corp., supra.*

Under the circumstances, it is respectfully submitted that the Union's proposal for an exclusive referral arrangement would settle no "term and condition of employment" within the meaning of § 8(d) of the Act, for the reason that the obtaining of employment is not a term or condition of employment. Furthermore, the Union's proposal would not deal with an employer's relationship to "his" employees within the meaning of § 8(a)(5) of the Act, because applicants for employment are not "his" employees.

II. The finding by the Court below that the Union's proposal for an exclusive referral arrangement was beyond the jurisdiction of the laws of the State of Texas which prohibit the negotiation or execution of any agreement containing such a proposal, raises an important question of Federal law which has not been, and should be, settled by this Court

It is now well established that the various States have the power and authority under § 14(b) of the Act to adopt and enforce substantive laws either curtailing or completely prohibiting Union security arrangements, despite the provisions of § 8(a)(3) of the Act which expressly permits agreements conditioning employment upon membership in a Union. For instance, this Court recently held in *Retail Clerks Int'l Ass'n, Local 1625, AFL-CIO* v. *Schermerhorn*, 373 U.S. 746, as follows:

> "As is immediately apparent from its language, Section 14(b) was designed to prevent other sections of the Act from completely extinguishing state power over certain union-security arrangements. And it was the proviso to Section 8(a)(3), expressly permitting agreements conditioning employment upon membership in a labor union, which Congress feared might have this result. It was desired to 'make certain' that Sec-

> tion 8(a)(3) could not be said to authorize arrangements of this sort in States where arrangements were contrary to the State policy.'"

See *Algoma Plywood & Veneer Co.* v. *Wisconsin Employment Relations Board*, 336 U.S. 301, 313-14, 315. Compare *NLRB* v. *General Motors Corp.*, 373 U.S. 734.

In the instant case the Petitioners rejected the Union's proposal for an exclusive referral arrangement because it violated the right-to-work law of the State of Texas. The Petitioners' defense was sustained by the District Court of Harris County, Texas. This construction of the Texas law, of course, was conclusive upon the Board and the Court below in their consideration of the instant case to the extent that it established the illegality of the Union's demands under the Texas right-to-work law. See *NLRB* v. *General Motors Corp., supra; Retail Clerks Int'l Ass'n, Local 1625, AFL-CIO* v. *Schermerhorn, supra; Amalgamated Ass'n of Street Elec. Ry. and Motor Coach Employees, Div. 1225* v. *Las Vegas-Tonopah-Reno Stage Line, Inc.*, 319 F. 2d 783 (9th Cir. 1963).

The Court below, however, concluded that the Union's proposal for an exclusive referral arrangement was beyond the jurisdiction of the laws of the State of Texas which prohibited its negotiation or execution. The primary reasoning of the Court below in reaching this conclusion was that "the long and short of this matter is that § 14(b) contemplates only those forms of Union security which are the practical equivalent of compulsory unionism" and that "membership in the Union is not compulsory under the clause here in question. This bold conclusion by the Court below constitutes a gross misconstruction of § 14(b) of the Act, as shown by the legislative history and the decisions of this Court construing § 14(b) of the Act.

The decisions by this Court have established that the types of Union security arrangements included within the scope of the provisions of §§ 8(a)(3) and 14(b) of the Act are *not* restricted to the closed shop or the union shop, as the Court below incorrectly assumes. As this Court stated in *NLRB* v. *General Motors Corp., supra:*

> "The prevailing administrative and judicial view under the Wagner Act was or came to be that the proviso to Section 8(3) covered both the closed shop and the union shop, *as well as less onerous union security arrangements,* if they were otherwise legal. The National Labor Relations Board construed the proviso as shielding from an unfair labor practice charge *less severe forms of union-security arrangements other than the closed or union shop* . . . .
>
> * * *
>
> "There is much to be said for the Board's view that, if Congress desired in the Wagner Act to permit a closed or union shop and in the Taft-Hartley Act the union shop then it also intended to preserve the status of less vigorous, less compulsory contracts which demanded less adherence to the Union." (emphasis added)

Accord, *Retail Clerks Int'l Ass'n, Local 1625, AFL-CIO* v. *Schermerhorn, supra.* See *M. J. Tracy Co., Inc.,* 12 NLRB 916, 931-34, and *J. E. Pearce Contracting & Stevedoring Co., Inc.,* 20 NLRB 1061, which involved hiring arrangements, described as "less severe forms of union-security arrangements" in *General Motors, supra* 373 U.S. at 739, fn. 6.

The legislative history of the Taft-Hartley Act and the Landrum-Griffin Act establish even more clearly that an exclusive referral arrangement is a type of union security arrangement left to regulation by the States under § 14(b) of the Act.

Senator Taft, co-sponsor of the Taft-Hartley Act, stated as follows:

> "In order to make clear the real intention of Congress, it should be clearly stated that the hiring hall is not necessarily illegal. The employer should be able to make a contract with the union as an employment agency. The union frequently is the best employment agency. The employer should be able to give notice of vacancies, and in the normal course of events to accept men sent to him by the hiring hall. *He should not be able to bind himself, however, to reject non-union men if they apply to him; nor should he be able to contract to accept men on a rotary hiring basis . . .*" S. Rep. No. 1826, 81st Cong., 2d Sess., pp. 13, 14. (emphasis added)

Statements made during consideration of § 8(f) of the Act disclose the conclusion even more clearly. For instance, Representative Flynn stated as follows:

> "The special privileges given the building trades do not apply in the 18 states having right-to-work laws. These privileges are in effect a closed shop right, which is outlawed in the right-to-work law states." 105 Daily Cong. Rec. A-8388, September 14, 1959.

Representative Hagan, after commenting on the special privileges granted to unions under Section 8(f) of the Act, summarized as follows:

> "Recognizing the practices prevailing in parts of the building and construction industry, the new law allows certain limited exceptions. Companies may make arrangements with unions in the following situations:
>
> Employers may legally sign a contract with the union even before the workers are actually hired.
>
> Such an agreement may require the worker to join the Union within seven days after he starts on the job (against the 30 days provided in all other lines).
>
> The agreement may require the employer to notify the Union of employment opportunities, permit them to refer qualified applicants, specify minimum qualifications and set up priorities for employment.

Exception: Since such arrangements come very close to imposing a closed shop, the provision is specifically made non-effective in the 19 states having the right-to-work laws." 105 Daily Cong. Rec. A-8449, September 14, 1959.

See 105 Daily Congressional Record 15120, August 20, 1959 (where Senator Goldwater described the referral provisions of Section 8(f) of the Act as "union-security agreements").

Under the circumstances, it is respectfully submitted that the Union's proposal for an exclusive referral arrangement was a form of union security agreement which should appropriately be subjected to the application of the laws of the State of Texas pursuant to the provisions of § 14(b) of the Act.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21327

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

versus

HOUSTON CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC. AND CONSTRUCTION EMPLOYERS' ASSOCIATION OF TEXAS,

Respondents.

Petition for Enforcement of an Order of the National Labor Relations Board.

(August 12, 1965.)

Before GEWIN, BELL, Circuit Judges, and McRAE, District Judge.

BELL, Circuit Judge: This petition of the National Labor Relations Board for enforcement of its order finding

respondents in violation of § 8(a)(5) and (1) of the Act[1] presents a unique labor law question. Respondents are non-profit corporations with memberships consisting of employers engaged in the building and construction trade in Texas. The unfair labor practice charge which gave rise to the petition to enforce was filed by the Construction and General Laborers Union, Local No. 18, International Hod Carriers, Builders and Common Laborers Union, AFL-CIO, the certified bargaining representative for the hod carriers and laborers employed by the contractors forming respondents' membership. The unfair labor practices occurred in Houston, Texas where respondents have their principal offices and places of business. Each respondent is the collective bargaining agent for its respective employer members, and the activities of the members admittedly affected interstate commerce in the degree required to give the Board jurisdiction.

Respondents and the Union began negotiating for a new contract several weeks prior to the expiration date, October

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[1] 29 USCA, § 158(a)(5) and (1):

"(a) It shall be an unfair labor practice for an employer —

"(5) to refuse to bargain collectively with the representatives of his employees, ..."

• • •

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;"

29 USCA, § 157:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, ..."

This court has jurisdiction of the proceeding under § 10(e) of the National Labor Relations Act, as amended. 29 USCA, § 160(e).

31, 1961, of the then existing contract. The union proposed that the contract include a provision for a non-discriminatory union hiring hall. The terms, among others, of the tendered provision were that the hiring hall would be the sole source of employees for the various contractors represented by respondents, that the union would select and refer applicants on the basis of such factors as seniority in employment by the respective contractors, length of residence in the area, and general work experience in the trade, but without discrimination by reason of membership or non-membership in the union. The employer was to retain the right to reject any applicant for employment, and the right to discharge any employee for good cause who had been accepted, but whose services consequently proved unsatisfactory. The hiring hall proposal had reference, of course, only to employees in the categories represented by the union.

Respondents rejected the proposal on the advice of counsel that a non-discriminatory union hiring hall was illegal under the Texas right to work laws which generally provide that no person shall be denied employment on account of membership or non-membership in a labor union.[2] Upon the expiration of the existing contract, the union called a strike in support of its contract demands including the demand for the hiring hall. A Texas state court enjoined the strike on the basis that a hiring hall agreement would contravene the public policy embodied in the Texas right to work laws. The parties subsequently entered into a contract substantially similar to the old contract, but without prejudice to the union pursuing its rights with respect to the hiring hall question. The union then filed a charge with the Board alleging that respondents had violated § 8(a)(5)

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[2] Articles 5154a, 5154g, 5207a, 7428-1, 7428-2, Revised Civil Statutes of Texas.

and (1) of the Act by refusing to bargain regarding the hiring hall proposal. The trial examiner sustained the unfair labor practice complaint issued on this charge.

The board affirmed, holding, with two members dissenting, that the hiring hall question presented a mandatory subject of bargaining under § 8(d) of the Act, 28 USCA, § 158(d). The board, as had the examiner, rejected the contention of respondents that the hiring hall proposal would constitute an agreement requiring membership in a labor organization as a condition of employment within the meaning of § 14(b) of the Act, 28 UCSA, § 164(b). This section leaves control of this question to the states where they choose to prohibit such a requirement.

We enforce. In our view the hiring hall clause in question was a mandatory subject of collective bargaining under the Act, and it does not fall under the § 14(b) exception.

It is now settled law that a labor contract providing for a non-discriminatory hiring hall is legal, absent the actual practice of discrimination under the agreement. *Local 357, International Brotherhood of Teamsters* v. *NLRB,* 1961, 365 U.S. 667, 81 S. Ct. 835, 6 L. Ed. 2d 11. But, the question whether a demand for such a clause falls within the class of mandatory subjects of bargaining, thus making it lawful to insist on their inclusion in labor agreements, depends on whether the demand comes within the meaning of the language ". . . wages, hours, and other terms and conditions of employment . . ." in § 8(d) of the Act.[3]

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[3] 29 USCA § 158(d):

> "For the purpose of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, ..."

Respondents urge that this language does not cover the obtaining of employment but is instead limited to those conditions which arise after an actual employment relationship has been established. They point to the inclusion of the term "hire" in § 8(a)(3), 29 USCA, § 158(a)(3), which makes it an unfair labor practice to discriminate ". . . in regard to hire or tenure of employment or any term or condition of employment . . . .", and the fact that "hire" is not included in § 8(d) to support this contention. The argument is that the omission was intentional and thus the hiring process is not embraced in § 8(d). However, § 8(d) also fails to mention "tenure of employment" while this clause is present in § 8(a)(3), and it has been held that "tenure of employment" is a condition of employment and subject to mandatory bargaining. See *Fiberboard Corp.* v. *NLRB,* 1964, 379 U.S. 203, 85 S. Ct. 398, 13 L. Ed. 2d 233. *Cf. Town & Country Mfg. Co.* v. *NLRB,* 5 Cir., 1963 316 F. 2d 846. The terms of hiring in this particular industry, such as would provide for the establishment of a seniority system through the use of a hiring hall, no less than tenure, are terms and conditions of employment.

Respondents also urge that § 8(d) is limited in scope to no more than what is allowed under the 1959 amendment to the Act set out in § 8(f), 29 USCA, § 158(f), which amendment would prohibit a strike to obtain the hiring hall clause. Section 8(f), in pertinent part, permits an employer in the building and construction industry to make a contract with a union before the union's majority is established to provide that the employer will notify the union of employment opportunities, or give such union an opportunity to refer qualified applicants for such employment. The amendment makes such a contract legal when absent the amendment it would not

be, because of the union not having a majority, but the contract is not a mandatory subject of bargaining so that strike action in support of obtaining it is authorized. *NLRB* v. *Int. Hod Carriers,* 8 Cir., 1960, 285 F. 2d 397, *cert. den.,* 366 U.S. 903. See 1 Leg. Hist. of LMRDA, pp. 424-425, 452, 946 (1959). The union in the case at bar was the statutory bargaining agent and § 8(f) is not applicable here by way of limitation or otherwise.

The case of *NLRB* v. *Wooster Division of Borg-Warner Corporation,* 1958, 356 U.S. 342, 350, 78 S. Ct. 718, 2 L. Ed. 2d 823, furnishes a guide for the application of the language of § 8(d) to the pending question of whether a proposal for a non-discriminatory hiring hall presents a subject matter over which bargaining is mandatory. The test there used was to determine whether the subject matter would settle any term or condition of employment, or would regulate the relations between the employer and employees. If so, in either event, bargaining is mandatory.

The record here discloses that employment in the construction trade is transitory in nature, with employees moving from job to job and employer to employer. The nature of the employment does not lend itself to employee security through seniority rights. The proposal of the union was to establish a system of seniority rights and job priority through the use of the non-discriminatory hiring hall. It seems clear that this aim bears directly on regulating relations between the employers and employees in the industry involved, and it would also settle a term or condition of employment. This is a multi-employer situation where the essence of employee security would rest on job priority standards being established through a common source — the hiring hall. In these circumstances we hold that the demand for a non-discriminatory hiring hall clause by the union presented a mandatory

subject of bargaining to respondents, and that they were obligated to bargain concerning it, unless the proposal was otherwise proscribed by the Labor Act.

With respect to proscription, it is urged that the hiring hall clause is a form of compulsory unionism left for regulation by the states under § 14(b) of the Act, 29 USCA, § 164(b), and invalid when found to be in conflict with a state law. That section provides:

> "Nothing in this subchapter shall be construed as authorizing the execution on application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

In *Local 24 of the International Bhd. of Teamsters* v. *Oliver,* 1959, 358 U.S. 283, 79 S. Ct. 297, 3 L. Ed. 2d 312, the Supreme Court reversed the order of an Ohio State court restraining a union and an employer from carrying out a provision regarding wages in their collective bargaining agreement as being in violation of an Ohio antitrust law. The court held that bargaining with respect to wages was mandatory under § 8(d) of the Act, and thus the Ohio law could not be applied to prevent the parties from carrying out their agreement on this subject unless Congress has left the subject matter to the states for regulation. There the subject matter had not been saved for state regulation. *Cf. Algoma Plywood and Veneer Company* v. *Wisconsin Employment Relations Board,* 1949, 336 U.S. 301, 69 S. Ct. 584, 93 L. Ed. 691, where the court upheld a state restriction of a maintenance of membership clause in a collective bargaining agreement on the basis that Congress intended to leave control of this aspect of labor relations to the states.

Respondents assert that the hiring hall clause here is a form of union security contemplated by § 14(b) and left to the states for prohibition. It is true that the terms of § 14(b) as well as the legislative history suggest the intent on the part of Congress to save to the states the right to prohibit compulsory unionism. However, the long and the short of this matter is that § 14(b) contemplates only those forms of union security which are the practical equivalent of compulsory unionism. See *NLRB* v. *General Motors Corp.*, 1963, 373 U.S. 734, 83 S. Ct. 1453, 10 L. Ed. 2d 670; *Retail Clerks* v. *Schermerhorn*, 1963, 373 U.S. 746, 83 S. Ct. 1461, 10 L. Ed. 2d 678. Membership in the union is not compulsory under the clause here in question. The hiring hall is to be administered on a non-discriminatory basis as between union members and non-union members. No doubt union membership will be encouraged under the arrangement, indeed it may be a boon to the union; nevertheless such an arrangement does not constitute compulsory unionism so long as the arrangement is not employed in a discriminatory manner. *Local 357, International Board of Teamsters* v. *NLRB, supra.*

Accordingly, we find that the hiring hall clause in question is not envisaged in § 14(b) and it follows that Texas is without authority to proscribe it. The federal labor law is paramount, and respondents should have bargained with the union on the clause.

ENFORCED.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1964

No. 21327

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

versus

HOUSTON CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC. AND CONSTRUCTION EMPLOYERS' ASSOCIATION OF TEXAS,

Respondents.

Petition for Enforcement of an Order of the National Labor Relations Board.

Before GEWIN, BELL, Circuit Judges, and McRAE, District Judge.

JUDGMENT

This cause came on to be heard on the petition of the National Labor Relations Board for enforcement of an order of The National Labor Relations Board made on June 28, 1963, in the proceedings known upon the records of the Board as Case Nos. 23-CA-1347 and 23-CA-1398, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the order of the Board in this cause be and the same is hereby, enforced.

"Per Bell, Circuit Judge"

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21,327

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

HOUSTON CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC. AND CONSTRUCTION EMPLOYERS' ASSOCIATION OF TEXAS,

Respondents.

Petition for Enforcement of an Order of the National Labor Relations Board, sitting at Washington, D. C.

(September 14, 1965)

ON PETITION FOR REHEARING

Before GEWIN, BELL, Circuit Judges, and McRAE, District Judge.

PER CURIAM:

It is ORDERED that the petition for rehearing in the above entitled and numbered cause be, and the same is hereby DENIED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21327

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

HOUSTON CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC. AND CONSTRUCTION EMPLOYERS' ASSOCIATION OF TEXAS,
Respondents.

DECREE

Before GEWIN, BELL, Circuit Judges, and McRAE, District Judge.

BY THE COURT:

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against the Respondents on June 28, 1963. The Court heard argument of respective counsel on December 10, 1964, and has considered the briefs and transcript of record filed in this cause. On August 12, 1965, the Court, being fully advised in the premises, handed down its decision granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Fifth Circuit that the said order of the National Labor Relations Board in said proceeding be enforced and that Respondents, Houston Chapter, Associated General Contractors of America, Inc., and Construction Employers' Association of Texas, their officers, agents, successors and assigns abide by and perform the directions of the Board in said order contained.

Entered: September 22, 1965

(ORIGINAL FILED SEPTEMBER 22, 1965)

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended [29 U.S.C. 151 *et seq.*] are as follows:

> Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).
>
> Sec. 8. (a) It shall be an unfair labor practice for an employer—
>
> • • • •
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have

voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

(5) to refuse to bargain collectively with the representatives of his employee, subject to the provisions section 159(a) of this title.

* * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification —

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no ex-

piration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees and labor organizations by paragraphs (2)-(4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this sub-section shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158-160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

(f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided,* That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this Section: *Provided further,* That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

Sec. 14(b). Nothing in this sub-chapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

The relevant provisions of the Texas Revised Civil Statutes are as follows :

Art. 5207a. Right to bargain freely not to be denied; membership in labor union.

Section 1. The inherent right of a person to work and bargain freely with his employer, individually or collectively, for terms and conditions of his employment shall not be denied or infringed by law, or by any organization of whatever nature.

Sec. 2. No person shall be denied employment on account of membership or non-membership in a labor union.

Sec. 3. Any contract which requires or prescribes that employees or applicants for employment in order to work for an employer shall or shall not be or remain members of a labor union, shall be null and void and against public policy. The provisions of this Section shall not apply to any contract or contracts heretofore executed but shall apply to any renewal or extension of any existing contract and to any new agreement or contract executed after the effective date of this Act.

Sec. 4. Definitions. By the term "labor union" as used in this Act shall mean every association, group, union, lodge, local, branch or subordinate organization of any union of working men, incorporated or unincorporated, organized and existing for the purpose of protecting themselves and improving their working conditions, wages, or employment relationships in any manner, but shall not include associations or organizations not commonly regarded as labor unions.

Sec. 5. If any clause, sentence, paragraph or part of this Act or the application thereof to any person or circumstances, shall for any reason be adjudged to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this Act and the application thereof, but shall be confined in its operation to the portion of the Act directly involved in the controversy in which judgment shall have been rendered and to the person or circumstances involved. Acts 1947, 50th Leg., p .107, ch. 74.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 833

HOUSTON CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., AND CONSTRUCTION EMPLOYERS' ASSOCIATION OF TEXAS, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a–8a) is reported at 349 F. 2d 449. The Board's Decision and Order (R. 82–93) [1] are reported at 143 NLRB 409.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 1965, a timely petition for rehearing was denied on September 14, 1965, and a decree enforcing the Board's order was entered on September

[1] "R." refers to the printed Volume I, Transcript of Record in the court below. "J.A." refers to the printed Joint Appendix in the court below. References preceding a semicolon are to the Board's findings; succeeding references are to the supporting evidence.

799-478—66

22, 1965 (Pet. 9a–11a). The petition for writ of certiorari was filed on December 17, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant portions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are set forth in the petition at pp. 13a–16a.

QUESTIONS PRESENTED

1. Whether the Union's proposal that applicants for employment be hired exclusively through a union hiring hall operated on a nondiscriminatory basis was a proposal relating to "wages, hours, and other terms and conditions of employment," and thus a mandatory subject of bargaining under Section 8(d) of the National Labor Relations Act.

2. Whether Section 14(b) of the Act permits a State to prohibit an agreement embodying such a proposal.

STATEMENT

Petitioner Associations are bargaining agents for a group of building and construction contractors doing business in Texas. They have bargained, in a multi-employer unit, with the Union,[1] which has been recognized as the representative of the hod carriers and laborers employed by petitioners' members (R. 49–52, 82–83; 23–25, 29, 42). At the outset of negotiations

[1] Construction and General Laborers Union, Local No. 18, International Hod Carriers, Building and Common Laborers Union, AFL–CIO.

over a contract to succeed the agreement due to expire October 31, 1961, the Union proposed a provision to establish a union hiring hall as the sole source of employees for petitioners' members (R. 83; 29–30, J.A. 11, 35, 73, 76). Under the proposed provision, the Union would select and refer applicants to the employers on the basis of factors such as seniority of employment within the unit, length of residence in the area, and general work experience in the trade, "without discrimination * * * by reason of membership or non-membership in the Union" (R. 83; J.A. 35–37, 76). Employers were to have the right to reject or request individual applicants for employment, and grievances arising from the operation of the hiring hall were to be subject to final determination by an "Appellate Tribunal" composed of an equal number of employer and union representatives (R. 83; J.A. 41, 76–81, 82–84). Petitioners rejected and refused to discuss the terms of the Union's proposal on the ground that it was illegal under the Texas "right-to-work" law[3] (R. 53, 83; J.A. 16–20, 31, 37–51, 59, 60, 63, 67–69).

After the expiration of the existing contract, the Union struck in support of its demands. Petitioners thereupon obtained from the District Court of Harris County, Texas, a temporary injunction restraining the strike or any picketing incident thereto, so long as it "has as an object the obtaining of an agreement * * * which provides that the * * * Union

[3] The provisions of the Texas statute are set forth at p. 17a of the petition.

shall be the sole or exclusive source of referrals of applicants for employment in violation of * * * the [Texas] Revised Civil Statutes" (R. 83, 92; J.A. 97–103, 105–110, 112–116). The Union thereafter withdrew its demand for the hiring hall, resumed negotiations with petitioners, and entered into a contract with them (R. 54, 83, 84; 48–49, 51, 69–70, 118, 131–133).

The Union then filed a charge with the Board alleging that petitioners had violated Section 8(a)(5) and (1) of the Act by refusing to bargain regarding the hiring hall proposal. The Board (with two members dissenting) found that the Union's proposal came within the area of mandatory bargaining over "wages, hours, and other terms and conditions of employment" specified in Section 8(d) of the Act, and that petitioners had therefore violated the Act by refusing to bargain about that proposal (R. 84–89).[4] The Board rejected petitioners' contention that the proposed hiring hall clause would constitute an agreement "requiring membership in a labor organization as a condition of employment" within the meaning of Section 14(b) of the Act, which withdraws federal authorization from such agreements where "prohibited by State or Territorial law" (R. 89–91). The Board ordered petitioners, *inter alia,* to cease and desist from their unlawful refusal to bargain, and to bargain, upon request, with the Union about an "ex-

[4] The Board's findings that petitioners had refused to bargain about the proposal (R. 83) and that the issues were not mooted by the execution of a collective bargaining agreement (R. 91-92) are not challenged here.

clusive, nondiscriminatory referral system" of hiring (R. 69–71, 93).

The court of appeals sustained the Board's findings and enforced the Board's order in its entirety (Pet. 1a–8a).

ARGUMENT

1. The court of appeals correctly held that the Union's proposal for an exclusive hiring hall was a matter respecting "wages, hours, and other terms and conditions of employment" within the meaning of Section 8(d) of the Act. In an area of transient employment, such as the building and construction industry with which this case deals, an exclusive hiring hall system plainly affects "conditions of employment," for it affords employee security by guaranteeing that seniority and experience will count on future jobs. See *Local 357, Teamsters* v. *National Labor Relations Board,* 365 U.S. 667, 672–673. The same conclusion was reached in the only other court of appeals decision on the question. *National Labor Relations Board* v. *Tom Joyce Floors, Inc.* (C.A. 9), November 4, 1965, 60 LRRM 2434.[5]

[5] There is no occasion in this case to reach the broad question, sought to be raised by the petition, whether all "matters preceding" the establishment of an employment relationship are "conditions of employment" and thus mandatory bargaining subjects (Pet. 8–9); hiring halls in the transient construction industry, as shown in the text, directly affect employee security and are thus within the definition in all events. In the Board's view, however, the term "conditions of employment," as used in Section 8(d), is, in fact, broad enough generally to cover subjects relating to establishing and terminating the employment relationship, as well as those relating solely to the continuation of that relationship. Cf. *Fibreboard Corp.* v. *National Labor Relations*

There is no merit to petitioners' contention that Section 8(f) of the Act requires a contrary conclusion (Pet. 12–15; Section 8(f) is set forth at Pet. 16a). As the court of appeals properly noted (Pet. 5a–6a), the legislative history of Section 8(f) shows that its purpose was to permit certain agreements in the building construction industry which would otherwise have been unlawful.[6] Section 8(f) does not, however, limit the rights conferred upon a union by other provisions of the Act. Since the Union here had the status of statutory bargaining representative, it had the right to compel bargaining over conditions of employment without reference to the provisions of Section 8(f).

2. The court of appeals properly rejected petitioners' alternative contention (Pet. 16–20) that, by virtue of Section 14(b) of the Act, the Union's hiring hall proposal was illegal under the Texas "right-to-work" statute. Section 14(b) empowers a State to regulate "agreements requiring membership in a labor organi-

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Board, 379 U.S. 203. The Board does not believe that this conclusion is precluded by the fact that Section 8(a)(3), which bars discrimination in employment, contains the word "hire" in addition to the phrase "condition of employment," whereas Section 8(d) does not contain the word "hire" (see Pet. 9–10). As the court below observed (Pet. 5a), Section 8(d) "also fails to mention 'tenure of employment' while this clause is present in § 8(a)(3), and it has been held [citing *Fibreboard*, *supra*], that 'tenure of employment' is a condition of employment and subject to mandatory bargaining."

[6] See S. Rept. No. 187 on S. 1555, 86th Cong., 1st Sess., pp. 28–29, 56, I Leg. Hist. of LMRDA (G.P.O., 1959), pp. 424–425, 452; H. Rep. No. 741 on H.R. 8342, 86th Cong., 1st Sess., p. 50, I Leg. Hist. 808; 105 Cong. Rec. A8274, September 18, 1959, II Leg. Hist. 1823.

zation as a condition of employment''—or their equivalent. See *Retail Clerks Ass'n* v. *Schermerhorn,* 373 U.S. 746, 750–751. The referral arrangement proposed by the Union here, however, explicitly provided that applicants for employment should be selected and referred "without discrimination by reason of membership or non-membership in the Union" (J.A. 76, par. 3). Union membership was therefore not a condition of employment under the hiring hall proposal in this case.[7] See *Local 357, Teamsters* v. *National Labor Relations Board,* 365 U.S. 667, 675.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[7] The cases relied upon by petitioners (Pet. 18) do not support their contention that the Union's proposal was the equivalent of requiring union membership as a condition of employment. Those cases involved either "agency shop" provisions, requiring nonunion employees to pay dues or the equivalent thereof to the union, or provisions for preferential hiring of union members.

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